IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-6806

RECEIVED
JUN 20 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

D. STEPHEN MENZIES,

Petitioner,

versus

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL ANTHONY MANESS
2260 Two Shell Plaza
Houston, Texas 77002
(713) 224-8900

Counsel for Petitioner

June 1980

INDEX

	Page
THE OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW:	
(1) Whether a defense witness's accusation in the presence of the jury that Petitioner's trial counsel and attorneys in his law firm had knowingly suborned perjury, coupled with similar accusations by the prosecution during closing argument, rendered Petitioner's trial, conviction and 30-year prison sentence so fundamentally unfair as to constitute a denial of due process of law	2
(2) Whether the Court of Appeals' refusal to grant a certificate of probable cause to appeal the substantial Federal question presented by this case ignored the established standard for granting such a certificate under Rule 22(b) of the Federal Rules of Appellate Procedure	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	13
CONCLUSION	18
APPENDIX (OPINIONS AND ORDERS BELOW)	A-1

TABLE OF CASES

Boswell v. Alabama, 537 F.2d 100 (5 Cir., 1976)	15
Bursten v. United States, 395 F.2d 976 (5 Cir., 1968)	16
Cannon v. Alabama, 558 F.2d 1211 (5 Cir., 1977), cert. denied, 434 U.S. 1087 (1978)	18
Coppedge v. United States, 369 U.S. 438 (1962)	14
Cruz v. Hauck, 404 U.S. 59 (1971)	18
Ellis v. United States, 356 U.S. 674 (1958)	14
Estelle v. Williams, 425 U.S. 501 (1976)	15
Estes v. Texas, 381 U.S. 532 (1965)	15
Ex parte Poresky, 290 U.S. 30 (1933)	14
Frank v. Mangum, 237 U.S. 309 (1915)	15
Goosby v. Osser, 409 U.S. 512 (1973)	14
Hannis Distilling Co. v. Baltimore, 216 U.S. 285 (1910)	14
Houston v. Estelle, 569 F.2d 372 (5 Cir., 1978)	17

	Page
In the Matter of the Application of Burwell, 350 U.S. 521 (1956)	14
Moore v. Dempsey, 261 U.S. 86 (1923)	15
Napue v. Illinois, 360 U.S. 264 (1959)	15
Sheppard v. Maxwell, 384 U.S. 333 (1966)	15
United States v. Candelaria-Gonzales, 547 F.2d 291 (5 Cir., 1977)	16
United States v. Guglielmini, 384 F.2d 602 (2 Cir., 1967) .	16
United States v. Kelly, 314 F.2d 461 (6 Cir., 1963)	16
United States v. Koenig, 300 F.2d 377 (6 Cir., 1962) . . .	16
United States v. Spears, 558 F.2d 1296 (7 Cir., 1977) . . .	16, 17
Wainwright v. Sykes, 433 U.S. 72 (1977)	18
Wardlaw v. United States, 203 F.2d 884 (5 Cir., 1953) . . .	16
Young v. United States, 346 F.2d 793 (D.C. Cir., 1965) . .	17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. _____

D. STEPHEN MENZIES,

Petitioner,

versus

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

D. Stephen Menzies, Petitioner in the above styled and numbered cause, respectfully prays that a writ of certiorari issue to review the denial by the United States Court of Appeals for the Fifth Circuit of Petitioner's original and renewed applications for a certificate of probable cause to appeal the denial of Federal habeas corpus relief by the District Court.

THE OPINIONS BELOW

The United States Magistrate's Memorandum and Recommendation, and the District Court's order of dismissal and final judgment denying Federal habeas corpus relief thereon, are reproduced as an Appendix to this petition at page A-1. The Memorandum

and Recommendation of the United States Magistrate, concluding that "there is not a substantial question of law for the Court of Appeals to review," and the District Court's order thereon denying Petitioner's pro se application for a certificate of probable cause, are reproduced as an Appendix to this petition at page A-9. The orders of the Court of Appeals denying Petitioner's original and renewed applications for a certificate of probable cause and for leave to appeal in forma pauperis are reproduced as an Appendix to this petition at pages A-11 to A-13.

JURISDICTION

The final order of the Court of Appeals denying Petitioner's renewed application for a certificate of probable cause and for leave to appeal in forma pauperis was entered on May 29, 1980. Petitioner invokes the Court's certiorari jurisdiction under 28 U.S.C. section 1257(1). Filing of this petition was timely under 28 U.S.C. section 2101(c).

QUESTIONS PRESENTED FOR REVIEW

(1) Whether a defense witness's accusation in the presence of the jury that Petitioner's trial counsel and attorneys in his law firm had knowingly suborned perjury, coupled with similar accusations by the prosecution during closing argument, rendered Petitioner's trial, conviction and 30-year prison sentence so fundamentally unfair as to constitute a denial of due process of law.

(2) Whether the Court of Appeals' refusal to grant a certificate of probable cause to appeal the substantial Federal question presented by this case ignored the established standard for granting such a certificate under Rule 22(b) of the Federal Rules of Appellate Procedure.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's Federal constitutional claims are based upon the Sixth and Fourteenth Amendments. No statutory provisions are involved.

STATEMENT OF THE CASE

Petitioner was indicted in October 1974 for the alleged rape of Deborah Ann Stone, a Houston cocktail waitress, and was brought to trial in the 177th Judicial District Court of Harris County, Texas in April 1975. He was represented by retained counsel, James Moore.

The State's case was based almost entirely on the testimony of Ms. Stone, who testified in substance that Petitioner, a customer of the bar where she worked, forced her into his automobile at approximately 3:30 a.m. and then raped her at another location, releasing her near her home approximately three hours later (R. 268, 279-80, 285). Petitioner's defense was that he had merely given the complainant a ride home at her request, after which he stopped at a restaurant for a cup of coffee and then went home, arriving there before 4 a.m. (R. 635-36). Petitioner also testified that following this incident the complainant and an unidentified male had telephoned him and attempted to extort $1,000.00 from him by threatening to file a charge of rape against him (R. 656-59).

To support Petitioner's version of the events, the defense called one of his former employees, Sylvia Aiken, who testified on direct examination that she had seen Petitioner in the restaurant drinking coffee at 3:30 a.m. on the morning in question (R. 563). On cross-examination, however, the following transpired in the presence of the jury:

> Questioning by Mr. Graham (counsel for the State):
>
> Q. Have you been told what to say in this case? "Yes" or "No"?
>
> A. I really don't want to say.
>
> Q. Well, are you afraid?
>
> THE COURT: You have to answer the question. Go ahead and answer the question.
>
> THE WITNESS: Yes, sir.

Q. (By Mr. Graham) You have been told what to say?

A. Yes, sir.

Q. Did they tell you to come here and say that Steve Menzies was in Denny's Restaurant?

A. I don't feel very good.

Q. I beg your pardon?

A. I don't feel very good.

Q. I can understand that, ma'am. I have to have an answer to that question.

Did they tell you to come in here and say that Steve Menzies was in Denny's Restaurant at 3:30 in the morning on August 17?

A. I really don't feel very good.

Q. Can you answer that "Yes" or "No"?

A. (No response).

Q. Are you afraid at this time?

A. Yes, sir.

Q. Are you afraid of what might happen to you if you answer that question?

A. I just don't know.

Q. Are you afraid of this defendant?

A. No, sir.

Q. Are you afraid of anybody that works for this defendant?

A. (No response).

Q. What are you afraid of?

A. Right now, I'm just very much afraid of everything.

Q. Well, you're under oath to tell the truth. If you tell the truth, there's nothing that can be done to you, ma'am.

A. Okay. Okay. I forgot what you were asking.

Q. Did they tell you to come in here and say that you were in Denny's at 3:30?

A. Yes, sir.

Q. And did they come in here and tell you to say that you saw the defendant in Denny's, did they tell you to come in here and say that?

A. Yes, sir.

Q. And did you really see the defendant in Denny's at 3:30?

A. No, sir.

Q. And who was it that told you to say that?

A. I really don't feel very good.

Q. Ma'am, you will be afforded protection, but we need to know the answer.

A. I'm sorry. I forgot what you asked me.

Q. Who was it that told you to come in here and tell this jury you saw the defendant in Denny's?

A. Well, several people.

Q. Who?

THE COURT: You may answer it.

THE WITNESS: Well, everybody that was involved.

Q. (By Mr. Graham) All right. And who would that include?

A. Will they get in trouble?

Q. That doesn't concern you, ma'am. That's for someone else to decide. Your only job is to tell the truth while you're under oath on the witness stand.

A. Golly! Golly! Just everybody that was involved in it.

Q. Does that include the defendant's family, the defendant's lawyers; who does it include?

A. Well, I can't really say that.

MR. MOORE: Your Honor, could I have this witness on voire dire. This is a serious accusation.

THE COURT: No, sir. Go ahead. You may answer the question. Don't worry. Go ahead.

THE WITNESS: Well, to begin with, I really can't say that -- I really can't say that Steve is responsible for it now, because, you know, he hasn't been around for a long time. He's been gone.

Q. (By Mr. Graham) Responsible for what?

A. For me saying this and honest to God, what I'm saying is the truth, and I really can't remember if he asked me -- I swear to God, I just can't remember if he did. I remember that he did approach me. That was the truth when I worked for him, and he did tell me the situation he was in, and he was concerned about it. But I can't remember if he did ask me to do this or not. I swear to God, my mind is blank. I can't remember because it's been a long time ago since I talked with Steve. This was before he went, you know, before he left.

But then his wife knew about it, and she wanted me to because she was very concerned about their little girl and Steve, and she, you know -- and Mr. Moore knew about it, and then his lawyer --

Q. Is that the man that just stood up over there?

A. And that's all. Everybody that was involved, and Mark knows, my fiance and me -- knew about it. He was aware of it. They knew I wasn't in Denny's, and that's all that I can remember.

Q. And was there threats made to you if you did not testify?

A. Well, no, exactly, no.

Q. Was there money offered?

A. No, sir. I was not paid any money.

Q. And were you afraid not to testify?

A. Well, I guess I was afraid to do it. As it all came down to it, I was -- I was just afraid both ways. (R. 573-78; emphasis added).

On cross-examination Mr. Moore attempted unsuccessfully to refute the accusation that he knew of the alleged efforts to suborn perjury by showing the witness written statements she had signed under oath, attesting to her having seen Petitioner on the occasion in question. The following transpired in the presence of the jury:

Q. (By Mr. Moore) Sylvia, think very carefully. Have I ever at any time suggested what your testimony should be?

A. (No response).

Q. Have I ever said, "Sylvia, say thus and so."

A. Yes, sir.

Q. And I said to tell the truth, did I not?

A. Well, yes, sir. But you knew it wasn't the truth.

Q. Well, you knew it wasn't the truth, Sylvia. But I'm saying when I told you to testify, I said, "Sylvia, tell the truth." Did I not?

A. You told me to tell what's on that paper.

* * * *

Q. Well, now when you wrote out that statement, you say now that's not true?

A. Well, yes, sir. Mr. Moore, you knew that.

Q. How would I have known it if I never had any conversation with you?

A. I told you, Mr. Moore.

Q. When did you tell me that?

A. Well, you, personally, yesterday. But the other [defense] lawyers knew it before.

Q. You told me this yesterday, where?

A. Are you trying to say that I'm lying, Mr. Moore, now?

Q. Sylvia, what we would like to know is when did you say that you told me about this statement?

A. Yesterday.

Q. What time and where?

A. You, personally, but the other guys already knew.

Q. Do what now?

A. The other [defense] lawyers already knew.

* * * *

Q. But did you ever say to me those statements are not true?

A. Yes, sir.

Q. When?

A. Yesterday.

* * * *

Q. Is it your testimony that you said to me yesterday, "That I gave you a false statement"?

A. I don't understand. Am I testifying that I told you yesterday that I didn't know this was true?

Q. Yes.

A. Yes, sir. I didn't know.

Q. That's what I say, I didn't know.

A. That this wasn't true?

Q. That's right.

A. I didn't know you did not know this wasn't true? I didn't know -- well, in other words, you knew that this wasn't true. That's all I can say.

Q. Well, how did I know if you didn't tell me any such thing?

A. (No response).

MR. MOORE: I'm upset, Judge.

THE COURT: All right.

THE WITNESS: Are you finished with me?

MR. MOORE: If the Court, please, I would like to introduce into evidence Exhibits 8 and 9 [the witness's written statements].

THE COURT: Admitted.

Q. By Mr. Moore) Now, Sylvia, when you acknowledged -- that is your signature, is it not?

A. Yes, sir, it is.

Q. Defense Exhibit 8 was one that you gave to some lawyer and you signed and swore to that, that's true, didn't you?

A. I didn't swear to that, but it didn't make any difference because I had to swear to it here today. This is the same thing as swearing under oath. So, I have already done it. If you're trying to, you know, I know I'm in trouble. So, that's clear to me. I have lied on the stand. I didn't care -- that makes no difference. I stood here and lied in front of everybody, and the District Attorney proved that I'm lying, too. So, what difference does it make at this point?

Q. But when you signed this statement in my office before the other lawyer, I didn't know anything about this statement, did I?

A. Yes, sir.

Q. Was I in the office that day?

A. Well, you were there last night.

* * * *

Q. Now, since we never had a discussion without someone being present about this case, who was present yesterday when you claim you told me this statement wasn't true?

A. Why do you keep saying "claim" like I'm not telling the truth?

Q. I'm trying to find out -- well, when did you say you did that, Sylvia?

A. When did I say I did what, now?

Q. That you told me yesterday -- you say that I knew something about you weren't telling the truth?

A. When we discussed my testimony, when did we do that, is that what you're asking me?

Q. No. I thought I understood you to say that you told me yesterday that your statements weren't true.

A. Well, yes, sir.

Q. When and where and who was there?

A. Yesterday, downtown on some street. Excuse me. Sally [Petitioner's wife] was there, and I'm not saying that she had any part in it. I'm just saying she was there. I don't even know if she heard it, and let's see. Yeah, the other lawyer was there, too. We were walking down the street after -- while the Court was on a recess.

A. What time?

Q. I think we recessed yesterday at 2:00. I don't remember. Whatever time we recessed, a few minutes after that. Whenever it was that you said you wanted to talk to me, that's when it was.

Q. And we had this conversation just walking down the street?

A. You don't remember, Mr. Moore?

Q. No, I don't. You said about 2:00, you and I were walking down the street with Michael Eheman [a lawyer in Mr. Moore's firm] and Sally Menzies, and you said something to me about a false statement?

A. Yes, sir.

Q. What did you say?

A. Let's see. Well, let's see. You want the whole conversation. Okay. You asked me -- well, let's see. I think I'm not positive to be -- this may not be verbatim, but you said -- I told you about how scared I was and everything, and scared about the day, and you asked me what the District Attorney had asked me when I saw him at work. And I think I told you it was really nothing of importance or something like that. Oh, yes. I told you that he asked me what my relationship was with Steve. That was what he was asking me, if I had worked for him, or was a friend, or whatever. And you asked me if he scared me, or threatened me, or anything, and I said "No." And then I was telling you how scared I was and you asked me, you said not to be scared or something to that effect. That's what you said, and there was nothing to be worried about. And then you asked me how the testimony came up because you said something about the date, or the time, or something. And I told you that I had forgotten what I was supposed to say because it had been so long since that last time. And you said I better not

have forgotten because you had a statement on me and an affidavit, and you told me Sally needed to get with me to refresh my memory and get everything to say. And you asked me why I had forgotten, and I said, "Well, because it wasn't true to begin with." And that I couldn't remember and I was scared to death because I wouldn't remember the dates, or the times, or anything. And I told you when I talked to the District Attorney that he wanted dates on everything.

* * * *

Q. And you say now that statement you wrote in our office is not true?

A. Well, yes, sir. You know that. Why are you asking me that? Yes, sir. If you would like for me to say -- it's already apparent. Yes, sir. That statement is a lie. I know I'm in a lot of trouble. I realize you're trying to make it worse for me, but I realize the situation, and I know I'm in trouble, and I'm sorry that this happened, but I couldn't help it. (R. 580-81; 588-91; 597-600; 601; emphasis added).

At the conclusion of Ms. Aiken's testimony, Mr. Moore unsuccessfully requested a continuance, stating that he was "physically and emotionally exhausted" and that "[i]n twelve years, I have never had anything like this to happen" (R. 608). He then called a succession of witnesses, including Petitioner's wife; Michael Eheman and Nathan J. Hellums, two attorneys associated with Mr. Moore in the practice of law who had participated in the preparation and execution of Ms. Aiken's written statements; and Wanda Taylor, Mr. Moore's secretary. Each of these witnesses stated that Ms. Aiken had never denied the truthfulness of her written statements prior to trial.

Petitioner testified that he was in fact at the Denny's restaurant on the morning in question but that he had not seen Ms. Aiken there (R. 639). He also testified that it was Ms. Aiken who initially advised him that she had seen him on that occasion (R. 640).

There is no evidence in the record that Petitioner actively participated in a scheme to secure perjured testimony from Ms. Aiken or that he otherwise had any reason to believe

that Ms. Aiken would testify falsely at his trial. Nevertheless, during his closing argument to the jury, counsel for the State repeatedly asserted that defense counsel had actively suborned perjury, and implied that the Petitioner was involved in that misconduct:

> "* * * I cannot imagine the gall it must take for him [Mr. Moore] to get up here and tell you what he's told you about Sylvia Aiken and me or this office having something on Sylvia Aiken, his witness who he called up here, who was so scared that she fell apart on the witness stand before he started talking to her, and after being caught in one lie, told him that she wasn't going through with it any more, and she wasn't going to lie for him and his people or the defendant and his people. You can decide whether I've got something on Sylvia Aiken. I'm the one that caused her to tell the truth. That's all I can say. [Mr. Moore is] up here trying to save his own skin and all the lawyers that work with him as well as the defendant." (R. 762; emphasis added).

* * * *

> "Then the defense starts bringing all the lawyers and people involved in these false statements taken from Sylvia Aiken trying to save their own necks and what else are they going to say except, "I didn't do anything'." (R. 779-80).

The jury convicted the Petitioner and sentenced him to imprisonment for 30 years. The Court of Criminal Appeals of Texas affirmed the conviction and sentence in an unpublished opinion,[1/] rejecting the claim of Petitioner's court-appointed attorney that Petitioner was denied the effective assistance of counsel because the allegation against Mr. Moore created a conflict of interest, compelling Mr. Moore to defend his own reputation at the expense of his client's interests. The Court found the interests of attorney and client to be not conflicting but convergent. "[T]here was a joint interest on the part of ap-

---

1/ The opinion is attached to this petition at page A-14.

pellant's counsel to show that not only did he not suborn perjury, but also that his client did not suborn perjury. * * * The record simply does not reflect that appellant's counsel was not effective after the witness Aiken indicated that he did suborn perjury" (at p. 3).

Petitioner then promptly filed a pro se Federal habeas corpus application in the United States District Court for the Southern District of Texas, essentially reurging the claim asserted by his court-appointed counsel on direct appeal. Respondent's Answer relied upon the rationale of the Court of Criminal Appeals, i.e., that there was no conflict of interest, and hence no denial of Petitioner's right to the effective assistance of counsel, because it was in his interest, as well as his attorney's, that the allegations of Mr. Moore's knowing involvement in Ms Aiken's perjured testimony be refuted. The United States Magistrate to whom the case was referred for the most part simply reiterated this theory in his Memorandum and Recommendation, finding that it was in Petitioner's best interests that Ms. Aiken's version of the events be challenged because "there was a genuine question about whether Petitioner did tamper with the witness" (at p. 4).[2/]

The District Court accepted the Magistrate's recommendation and dismissed the case on his findings, after first denying Petitioner's request for appointment of counsel. Petitioner then filed a pro se application for a certificate of probable cause, which was likewise denied by the District Court on the basis of the Magistrate's determination that "there is not a substantial question of law for the Court of Appeals to review."

2/ There is literally no evidence in the record to support the Magistrate's supposition that a "genuine question" existed with respect to Petitioner's involvement in the episode. Presumably the Magistrate reached this conclusion solely upon the basis of the testimony previously quoted in this petition.

In accordance with Rule 22(b) of the Federal Rules of Appellate Procedure, Petitioner filed a timely notice of appeal to the Court of Appeals and presented his pro se application for a certificate of probable cause to that Court. The application was denied by a single Circuit Judge on February 28, 1980. Petitioner then sought and obtained the services of his present attorney and, with the assistance of counsel for the first time at any stage of his efforts to obtain Federal habeas corpus relief, filed a renewed application for a certificate of probable cause and for leave to appeal in forma pauperis. In this renewed application Petitioner's counsel set out in detail the circumstances of the trial and argued that they implied not a frivolous or trivial claim but a substantial constitutional question under the Sixth and Fourteenth Amendments. Nonetheless, the same Circuit Judge again denied this renewed application on April 16, 1980. Counsel then requested reconsideration of the case by a panel of the Court of Appeals, which again denied the application on May 29, 1980.[3/]

REASONS FOR GRANTING THE WRIT

The superficial consideration thus far given to this case by the District Court and the Court of Appeals is both unprincipled and unconscionable. Certiorari should be granted to again reaffirm the principle that denials of leave to appeal in Federal habeas corpus proceedings cannot and must not become merely a procedural device for avoiding the merits of substantial constitutional claims asserted by indigent prisoner-litigants.

3/ Petitioner's counsel has been advised by the office of the Clerk of the Court of Appeals that the Fifth Circuit's practice does not permit en banc reconsideration of the denial of a certificate of probable cause by a panel of that Court. The end result is that, after exhausting every available remedy, Petitioner has been denied the right to appeal.

This Court has never definitely prescribed a standard for the determination of whether a certificate of probable cause to appeal should be allowed under Rule 22(b) of the Federal Rules of Appellate Procedure.[4/] There is little doubt, however, that the standard contemplated by that rule, and the standard recognized in practice by the Courts of Appeals, is essentially that which governs the determination of whether leave to appeal in forma pauperis should be granted under 28 U.S.C. section 1915 -- that is, whether the applicant "seeks appellate review of any issue not frivolous." Coppedge v. United States, 369 U.S. 438, 445 (1962). Just as there is "no requirement of a preliminary showing of any particular degree of merit," Ellis v. United States, 356 U.S. 674, 675 (1958), so there is no requirement that the Petitioner demonstrate the probability of ultimate success on the merits. It is enough if the application reveals a non-frivolous issue for review.

Cases presenting a substantial constitutional claim are, by definition, not frivolous. A constitutional claim is insubstantial, and hence frivolous, only if "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288 (1910); Ex parte Poresky, 290 U.S. 30, 32 (1933); Goosby v. Osser, 409 U.S. 512, 518-19 (1973). Judged by this standard, the principal question presented by this case cannot rationally be characterized as constitutionally insubstantial. On the contrary, the Sixth and Fourteenth Amendments plainly interdict a criminal conviction and sentence resulting from a trial as patently unfair as that revealed by this record.

4/ This Court has, however, left the procedures governing such a determination largely to the discretion of the Courts of Appeals. In the Matter of the Application of Burwell, 350 U.S. 521 (1956).

Thus far, every Judge considering this case appears to have analysed the problem exclusively in terms of a purported "conflict of interest" between the Petitioner and his trial counsel, leading to the superficially appealing conclusion that, because their mutual interests in attacking and discrediting the witness's testimony were not antagonistic, there was no "conflict" and hence no constitutional violation. This analysis obscures a much more basic point: Petitioner's trial was fundamentally unfair, and therefore a deprivation of his right to due process of law, simply because the allegations leveled against his trial counsel irrevocably prejudiced the defense in the eyes of the jury and rendered impossible the effective presentation of that defense. It was the impact of the affair on the jury and its deliberations, not some hypothesized "conflict of interest," that rendered the resulting conviction constitutionally invalid.

Familiar examples of instances in which actual or potential prejudice to the accused unacceptably infects the deliberative processes of the jury are those involving mass media publicity, Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965), mob-dominated proceedings, Moore v. Dempsey, 261 U.S. 86 (1923); Frank v. Mangum, 237 U.S. 309 (1915); the trial of an accused in a prison uniform or in shackles, Estelle v. Williams, 425 U.S. 501 (1976); Boswell v. Alabama, 537 F.2d 100 (5 Cir., 1976), and the knowing use of perjured testimony. Napue v. Illinois, 360 U.S. 264 (1959). In each of these instances the accused is deprived of due process of law because extraneous considerations render improbable or impossible an impartial judgment as to guilt, wholly apart from any ineffectiveness of defense counsel in preventing such prejudice.

In some cases, however, prejudice renders a trial fundamentally unfair precisely because it effectively cripples the ability of a defendant's lawyer to present his defense. The most common examples, and those most closely resembling the unusual events in the present case, involve situations in which either the Trial Judge or the prosecutor has personally attacked the credibility or integrity of defense counsel in the presence of the jury.

For example, in Bursten v. United States, 395 F.2d 976 (5 Cir., 1968), the Trial Judge's repeated excoriation of the defendant's lawyer in the jury's presence resulted in the reversal of the conviction because it "prejudiced the jury and * * * had a deleterious effect upon appellant's right to a fair trial." 395 F.2d at 984. To the same effect is United States v. Candelaria-Gonzales, 547 F.2d 291 (5 Cir, 1977), where a combination of improper cross-examination of defense witnesses and the Trial Judge's gratuitous disparagement of counsel in the presence of the jury triggered reversal, and Wardlaw v. United States, 203 F.2d 884, 886-87 (5 Cir., 1953), where "[t]he comments and remarks of the court in the presence of the jury would have had no effect other than to impress the jury with the belief that there was no good faith defense." See also United States v. Guglielmini, 384 F.2d 602 (2 Cir., 1967) (Trial Judge "cast the prosecutor in the role of a young neophyte David contesting against a practiced Goliath"); United States v. Koenig, 300 F.2d 377 (6 Cir., 1962) ("extremely hostile attitude toward the defendants and their counsel by the trial judge"); United States v. Kelley, 314 F.2d 461 (6 Cir., 1963) ("threat of contempt not only tended to belittle the [defense] lawyer in the eyes of the jury, but also to unnerve him and throw him off balance so that he could not devote his best talents to the defense of his client"); United States v. Spears, 558 F.2d 1296

(7 Cir., 1977)(court's "castigation of counsel so discredited him in the eyes of the jury that he could not have remained an effective spokesman for his client"); Young v. United States, 346 F.2d 793 (D.C. Cir., 1965).

Similar prejudice arises when the source of statements discrediting or belittling defense counsel is the prosecutor in closing argument. As an example, in Houston v. Estelle, 569 F.2d 372 (5 Cir., 1978), the prosecutor repeatedly attacked the motives of both the defendant and his lawyer, including references to a defense motion for mistrial and objections as thinly disguised efforts to keep both the truth of the case and its decision from the jury. The Court of Appeals held the trial to have been fundamentally unfair and set aside the conviction.

No principled distinction can be drawn between prejudice deliberately generated by the conduct of Trial Judge or prosecutor and prejudice fortuitously arising during the course of the trial from a defense witness's concession of perjury on cross-examination and adamant assertion that defense counsel knowingly elicited it. If anything, the prejudice here is infinitely more damaging to the integrity of the jury's deliberative process, since it totally destroys the credibility of defense counsel and suggests that the entire defense has been contrived. A jury might sympathize with a lawyer unfairly berated by a hostile Trial Judge or an overly zealous prosecutor, but it could never accept anything said by an attorney accused of having knowingly participated in the commission of a felony.

Of course, an altogether different case would be presented if the evidence established that the Petitioner was an active participant in a scheme to suborn perjury. There is, however, literally no evidence in the record to support that supposition. Accordingly, Petitioner cannot be held responsible for prejudice he did not himself help to create, particularly

when it tended to undermine not only his own credibility but his entire defense.

The absence of any defense motion for mistrial, or any request that the Trial Judge attempt to ameliorate the consequences of the witness's accusation by instructing the jury to disregard it, is altogether irrelevant. First, the Court of Criminal Appeals considered the claim on its merits. Cf. Wainwright v. Sykes, 433 U.S. 72 (1977); Cannon v. Alabama, 558 F.2d 1211, 1216, n. 12 (5 Cir., 1977), cert. denied, 434 U.S. 1087 (1978). Secondly, the prejudice was so egregious that nothing could have cured it. The only course open, and one that should have been followed by the Trial Judge sua sponte, was a mistrial. The situation was no different than if defense counsel had died during the course of the trial. In a manner of speaking, he did.

Whatever the ultimate disposition of this case on its merits, it cannot be summarily ignored without seriously compromising the integrity of Rule 22(b) and the process of appellate review. United States Circuit Judges do not enjoy unlimited discretion to deny the right to appeal a substantial, non-frivolous constitutional question. Their attempt to exercise such discretion by withholding a certificate of probable cause from this Petitioner should be decisively rejected.

CONCLUSION

For all of the foregoing reasons, Petitioner D. Stephen Menzies respectfully prays that his petition for the writ of certiorari be granted, and that the orders of the Court of Appeals be summarily vacated and the cause remanded for issuance of a certificate of probable cause and consideration of the case on its merits. Cruz v. Hauck, 404 U.S. 59 (1971).

Respectfully submitted,

MICHAEL ANTHONY MANESS
2260 Two Shell Plaza
Houston, Texas 77002
(713) 224-8900

Counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
SEP 27 1979
V. BAILEY THOMAS, CLERK
BY DEPUTY: B.C. Lozano

D. STEPHEN MENZIES, §

Petitioner §

V. §

W. J. ESTELLE, JR., Director, Texas Department of Corrections, §

Respondent §

CIVIL ACTION NO. H-78-2441

Judge Carl O. Bue, Jr.

MEMORANDUM AND RECOMMENDATION:

Petitioner was convicted of the crime of rape after a jury trial in the 177th Judicial District Court of Harris County, Texas. Thereafter, Petitioner was sentenced to thirty years imprisonment. The Texas Court of Criminal Appeals affirmed his conviction in an unreported opinion dated November 15, 1978. Petitioner was represented at trial by James A. Moore and on appeal by Jim Tatum. Mr. Moore was retained; Mr. Tatum was court-appointed. Habeas relief is sought on the ground that a conflict of interest developed between Mr. Moore and Petitioner during the course of the trial. Hence, it is said that trial counsel was ineffective.

The facts surrounding Petitioner's claim are not in dispute. The complaining witness testified that Petitioner forced her into his car at 3:30 a.m., August 17, 1974. She stated that Petitioner raped her and did not release her until three hours later (Tr. 268, 279-280, 285).

Petitioner contended that he merely had given the complainant a ride home on the night in question. He said that after he dropped her off, he went to Denny's, a Houston restaurant, at about 3:30 a.m. to have a cup of coffee (Tr. 635-636). According to Petitioner, he had returned home by 4:00 a.m. that night (Petitioner's Traverse, Appendix at 8).

The defense called Sylvia Aiken, a former employee of Petitioner's, to the stand as an alibi witness. On direct examination, Ms. Aiken testified that she had seen Petitioner in "Denny's" at 3:30 a.m., August 17, 1974 (Tr. 563).

On cross examination, however, Ms. Aiken admitted that her previous testimony was false and that she had given it knowing it to be false (Tr. 577).

Ms. Aiken also said that Mr. Moore, Michael Eheman and Nathan John Hellums - the latter two being Mr. Moore's law partners - and Sally Menzies - Petitioner's wife - all had urged her to give the perjured testimony (Tr. 575, 577, 588). Ms. Aiken's reference to Petitioner in her testimony will be set out infra.

Petitioner claims that once the possibility of subornation was raised, he was deprived of his right to conflict-free counsel. According to Petitioner, Mr. Moore "dropped his client like a hot potato and started defending himself" in the wake of Ms. Aiken's allegations (Petitioner's Traverse, March 27, 1979, at 6).

The record reflects that after Ms. Aiken made her revelation, she was taken on redirect examination by Mr. Moore. Through this questioning, defense counsel attempted to show how he had not induced this witness to give perjured testimony. The following excerpt from that colloquy is indicative of his effort:

> Q. ....Have I at any time suggested what your testimony should be?
>
> A. (No response).
>
> Q. Have I ever said, "Sylvia, say thus and so"?
>
> A. Yes, sir.
>
> Q. And I said to tell the truth, did I not?
>
> A. Well, yes, sir. But you knew it wasn't the truth.
>
> Q. Well, you knew it wasn't the truth, Sylvia. But I'm saying when I told you to testify, I said "Sylvia tell the truth." Did I not?
>
> A. You told me to tell what's on that paper [that is, an affidavit given by Ms. Aiken]....
>
> Q. Did I say, "Sylvia, you write out a statement as to to what happened."?
>
> A. The other guy told me to write it out.
>
> Q. I didn't have any conversation with you about this statement, did I?
>
> A. No sir, ...

(Tr. 581).

Sally Menzies followed Ms. Aiken to the stand. Ms. Menzies first gave testimony tending to show that neither she nor Mr. Moore had been aware of the falsity of Ms. Aiken's statements (Tr. 618, 619). The witness was

also queried about her husband's whereabouts on the night of the rape. Ms. Menzies said that Petitioner had returned home at 4:00 a.m. that night (Tr. 620).

Michael Eheman was the next witness for the defense. Mr. Eheman was with Ms. Aiken the night before trial, when she wrote out a statement that she had seen Petitioner in the restaurant (Tr. 626). Mr. Eheman also denied that Ms. Aiken ever challenged the verity of her statement before trial commenced (Tr. 627-628).

Petitioner, following Mr. Eheman to the stand, protested his innocence and gave a resumé of his actions on the night of the rape. While he asserted that he in fact was in Denny's, as Ms. Aiken initially claimed, he said he could not remember seeing Ms. Aiken there (Tr. 639). According to Petitioner, it was Ms. Aiken herself who first informed him that she had seen him in Denny's (Tr. 640).

Mr. Moore next called Nathan John Hellums to testify. Three months before trial, Mr. Hellums had taken a statement from Ms. Aiken (Tr. 689).[1] This statement was similar to the one later given to Mr. Eheman. In response to Mr. Moore's questions, Mr. Eheman indicated that Ms. Aiken never mentioned that she had been relaying untruthful information (Tr. 691).

Wanda Taylor, Mr. Moore's secretary, was present when Ms. Aiken executed both of the above-mentioned statemens (Tr. 703). Like the witnesses before her, Ms. Taylor explained from the stand how the statements had been prepared. Ms. Taylor testified that Ms. Aiken had never told her that the statements contained falsehoods (Tr. 707-708).

The defense recalled Petitioner to the stand as its final witness at the guilt-innocence stage of the trial. In his testimony, Petitioner attempted to rebut evidence presented by the state that he had raped another woman in 1973.

The undivided loyalty of counsel is essential to due process. MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960); modified 289 F.2d 928,

---

[1] By the time of Petitioner's trial, Mr. Moore and Mr. Hellums were no longer law partners.

cert. denied, 82 S.Ct. 121 (1961). The guarantee of conflict-free counsel originated in Glasser v. United States, 62 S.Ct. 457 (1942). Although that case involved simultaneous representation of co-defendants, unconstitutional conflicts of interest have not been limited to such situations. United States v. Alvarez, 580 F.2d 1251, 1254 (5th Cir. 1978). However, "an actual, not merely hypothetical or speculative conflict must be demonstrated before it can be said that an accused has been deprived of effective assistance of counsel." Id. at 1255.

It does not appear that a conflict of interest existed between Petitioner and Mr. Moore. Even though both attorney and client were implicated through Ms. Aiken's testimony, their interests were not adverse. Petitioner contends that he was not included in Ms. Aiken's accusations; however, the record does not support such a conclusion. With respect to Petitioner's involvement in the alleged subornation plot, Ms. Aiken testified:

> "I really can't remember if he [Petitioner] asked me -- I swear to God, I just can't remember if he did. I remember that he did approach me. That was the truth when I worked for him, and he did tell me the situation he was in, and he was concerned about it. But I can't remember if he did ask me to do this or not."

(Tr. 577). While Ms. Aiken did not directly accuse Petitioner of subornation, her testimony was not exculpatory. It is clear that Petitioner did "approach" her. Further, Petitioner's conduct with respect to another witness had already been impugned. Earlier in the trial, the complainant testified that Petitioner had warned her that if she ever went to the police, he would kill either her or her son (Tr. 283). In light of this alleged threat, Ms. Aiken's testimony, set out above, certainly was enough to raise suspicions about Petitioner's participation in the subornation plot.

The specificity of Ms. Aiken's accusation is of little consequence. What is important is that there was a genuine question about whether Petitioner did tamper with the witness. As long as this uncertainty remained, it was in Petitioner's best interest for Mr. Moore to challenge Ms. Aiken's tale.

The record reflects that Mr. Moore did no more than attempt to establish that all those who had been implicated by Ms. Aiken's testimony had in fact conducted themselves properly. The five witnesses who took the stand after Ms. Aiken were the very persons - Petitioner included - who were said to have

encouraged the perjury. The time spent assailing Ms. Aiken's story through these witnesses was not unduly long. Ms. Aiken, after all, was Petitioner's alibi witness. Petitioner's best hope for acquittal rested on her initial testimony. The proper question to ask is which course would have most benefitted Petitioner - refuting Ms. Aiken's allegations or permitting the allegations to go unchallenged. Upon Ms. Aiken's recantation, Mr. Moore could do little but attempt to mitigate the harm which befell the defense. Outside of Petitioner's wife, whose credibility was also diminished because of Ms. Aiken, there were no other witnesses to corroborate Petitioner's version of the facts. Petitioner does claim that "[t]wo defense alibi witnesses that were waiting in the hall to testify...were sent home by defense counsel because Sylvia Aiken's accusations had forced him to put on his own defense." (Petitioner's Traverse at 16). However, Petitioner neither identifies these witnesses nor summarizes what their testimony would have been. In the absence of such supporting factual allegations, the claim is insufficient. Cunningham v. Estelle, 536 F.2d 82, 83 (5th Cir. 1976).

Petitioner seeks to bolster his position by arguing that at the sentencing hearing, Mr. Moore was allowed to withdraw as counsel of record because of "conflicting interest." The record reflects that at the hearing, Petitioner submitted a motion for a new trial which he himself had prepared. In his motion, Petitioner attacked - just as he does in this Court - the effectiveness of Mr. Moore's services. Upon the court's receipt of this motion, Mr. Moore addressed the judge:

> " In view of the fact that the motions which he now filed, I feel I would be in a position inconsistent with my best interest to do the allegations contained in thereto. [sic]
>
> Certainly I do not join in those motions, nor do I present those to the Court. and in view of those allegations, I would like to be allowed to withdraw at this time. "

(Tr. 863, emphasis added).

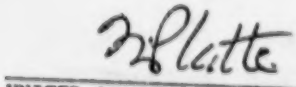
It can be seen that Ms. Aiken's accusation was not the direct cause of Mr. Moore's decision to withdraw. Counsel sought to withdraw after a conflict of interest arose when his performance had been assailed in Petitioner's motion for a new trial. Mr. Moore, understandingly, had no desire to challenge his own effectiveness at trial.

Because Ms. Aiken's testimony resulted in no actual conflict of interest between Petitioner and counsel, it is RECOMMENDED that Petitioner's Motion for Summary Judgment be DENIED and that this petition for writ of habeas corpus be DENIED.

In light of the foregfoing, it is further RECOMMENDED that Petitioner's a) Application for Bail Bond Pendente Lite; b) Motion for an Immediate Bail Bond Hearing Pendente Lite Or/Alternative Grant Early Habeas Corpus Hearing; and, c) Motion to Enter Judgment on Petitioner's Motion For an Immediate Bail Bond Hearing Pendente Lite Or/Alternative Grant Early Habeas Corpus Hearing be DENIED as moot. Accordingly, it is also RECOMMENDED that Respondent's Motion to Dismiss, filed in response to these three pleadings, be GRANTED.

The Clerk will file this instrument and transmit a copy to each party or counsel. Within ten days after receipt of the copy, a party may file with the Clerk, and serve on all parties, written objections, pursuant to Local Rule 24 and 28 USC §636(b)(1)(C).

Done at Houston, Texas, this 27th day of September, 1979.



UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
NOV 9 1979
V. BAILEY THOMAS, CLERK
BY DEPUTY: B. Lozano

D. STEPHEN MENZIES, §

Petitioner §

V. §

CIVIL ACTION NO. H-78-2441

W. J. ESTELLE, JR., Director, Texas Department of Corrections, §

Respondent § Judge Carl O. Bue, Jr.

ORDER OF DISMISSAL

The Court has reviewed the United States Magistrate's Memorandum and Recommendation, filed on September 27, 1979, and Petitioner's Objections, filed October 17, 1979. It is ORDERED that said Memorandum and Recommendation be and the same is hereby adopted as the Court's Memorandum and Order.

It is therefore ORDERED, ADJUDGED and DECREED as follows:

1. Petitioner's Motion for Summary Judgment is DENIED, and the case is DISMISSED.

2. Petitioner's Application for Bail Bond Pendente Lite is DENIED as moot.

3. Petitioner's Motion for an Immediate Bail Bond Hearing Pendente Lite Or/Alternative Grant Early Habeas Corpus Hearing is DENIED as moot.

4. Petitioner's Motion to Enter Judgment on Petitioner's Motion For an Immediate Bail Bond Hearing Pendente Lite Or/Alternative Grant Early Habeas Corpus Hearing is DENIED as moot.

5. Respondent's Motion to Dismiss as to items 2, 3 and 4 is GRANTED.

The Clerk will enter this Order and provide all parties with a true copy.

Done at Houston, Texas, this 9th day of November, 1979.

UNITED STATES DISTRICT JUDGE

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
NOV 9 1979
V. BAILEY THOMAS, CLERK
BY DEPUTY: B.E. Lyons

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

D. STEPHEN MENZIES,	§	
	§	
Petitioner	§	
	§	
V.	§	CIVIL ACTION NO. H-78-2441
	§	
W. J. ESTELLE, JR., Director, Texas Department of Corrections,	§	
	§	
Respondent	§	Judge Carl O. Bue, Jr.

FINAL JUDGMENT

From a consideration of the pleadings submitted in this case, it is the opinion of this Court that this action should be and is hereby DISMISSED.

The Clerk will enter this Final Judgment and provide all parties with a true copy.

Done at Houston, Texas, this 9th day of November, 1979.

UNITED STATES DISTRICT JUDGE

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
DEC 18 1979
V. BAILEY THOMAS, CLERK
BY DEPUTY: M. Cooper

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

D. STEPHEN MENZIES,	§	
	§	
Petitioner	§	
	§	
V.	§	CIVIL ACTION NO. H-78-2441
	§	
W. J. ESTELLE, JR., Director, Texas Department of Corrections,	§	
	§	
Respondent	§	Judge Carl O. Bue, Jr.

MEMORANDUM AND RECOMMENDATION:

Petitioner filed this action pursuant to 28 USC §2254. The case was dismissed and a final judgment was entered on November 9, 1979. Presently before the Court is Petitioner's Motion for Certificate of Probable Cause.

It is RECOMMENDED that a certificate of probable cause be DENIED under the provisions of 28 USC §2253 since there is not a substantial question of law for the Court of Appeals to review.

In light of the foregoing, it is also RECOMMENDED that Petitioner's Request for Transmission of the Record be DENIED.

Done at Houston, Texas, this 18th day of December, 1979.

H. LINCO PLATTER
UNITED STATES MAGISTRATE

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
DEC 20 1979
V. BAILEY THOMAS, CLERK
BY DEPUTY M. Cooper

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

D. STEPHEN MENZIES,	§	
	§	
Petitioner	§	
	§	
V.	§	CIVIL ACTION NO. H-78-2441
	§	
W. J. ESTELLE, JR., Director, Texas Department of Corrections,	§	
	§	
Respondent	§	Judge Carl O. Bue, Jr.

ORDER

For the reasons set forth in the United States Magistrate's Memorandum and Recommendation, signed on December 18, 1979, it is ORDERED that said Memorandum and Recommendation be and the same is hereby adopted as the Court's Memorandum and Order.

It is therefore ORDERED, ADJUDGED and DECREED as follows:

1) Petitioner's Motion for Certificate of Probable Cause is DENIED; and

2) Petitioner's Request for Transmission of the Record is DENIED.

The Clerk will enter this Order and provide all parties with a true copy.

Done at Houston, Texas, this 20th day of December, 1979.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-8058

U.S. COURT OF APPEALS
FILED
FEB 28 1980

GILBERT E. GANUCHEAU
CLERK

D. STEPHEN MENZIES,

Petitioner,

versus

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent.

- - - - -

On Application for Certificate of Probable Cause

- - - - -

O R D E R:

IT IS ORDERED that petitioner's pro se application for certificate of probable cause is denied.

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-8058

U.S. COURT OF APPEALS
FILED
APR 16 1980
GILBERT F. GANUCHEAU
CLERK

D. STEPHEN MENZIES,

Petitioner,

versus

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent.

On Application for Certificate of Probable Cause and for Leave to Appeal In Forma Pauperis

---

O R D E R:

IT IS ORDERED that petitioner's second application for certificate of probable cause and for leave to appeal in forma pauperis is denied.

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
MAY 29 1980
GILBERT F. GANUCHEAU
CLERK

No. 80-8058

D. STEPHEN MENZIES,

Petitioner,

versus

W. J. ESTELLE, JR., Director, Texas Department of Corrections,

Respondent.

- - - - - -

On Application for Certificate of Probable Cause and for Leave to Appeal in Forma Pauperis

- - - - - -

Before AINSWORTH, FAY and RANDALL, Circuit Judges.

BY THE COURT:

A member of this panel has heretofore denied petitioner's second application for certificate of probable cause and for leave to appeal in forma pauperis. Upon consideration by this panel upon request of petitioner, IT IS ORDERED that petitioner's second application for certificate of probable cause and for leave to appeal in forma pauperis is denied.

D. STEPHEN MENZIES, Appellant

NO. 54,000 v. - - - - - Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

O P I N I O N

This is an appeal from a conviction for the offense of rape. After a trial before the jury upon a plea of not guilty the appellant was found guilty and his punishment was assessed at confinement for a term of thirty years.

Appellant raises one ground of error in this appeal in which he complains that he was denied effective assistance of counsel due to allegations brought against retained counsel during the trial in the presence of the jury. The appellant takes the position that he was denied the undivided loyalty of his counsel due to conflicting interests once his counsel had been accused, in effect, of suborning perjury.

The record in this cause reflects that on cross examination by the State the witness Aiken, an alibi witness for appellant, admitted that her testimony which had been elicited on direct examination was false. In substance, this witness testified on cross examination that the appellant's attorney and appellant's wife knew her testimony was false but she could not remember whether or not the appellant had requested her to testify falsely.

After the witness Aiken left the stand the appellant's counsel put on testimony by other members of his office staff indicating that they were not aware that the witness's testimony was going to be false. The appellant testified that he was not aware that the witness's testimony was going to be false. It is in this light that the appellant now contends that he was denied the effective assistance of counsel because his counsel was rendered ineffective as a result of the revelation by the witness Aiken that her false testimony had been knowingly presented by his counsel at trial. The basis of the

appellant's position is that the full talents of his counsel were not used to aid the appellant but were directed at attempting to vindicate the appellant's counsel from the charges of suborning perjury.

As was pointed out in Gallegos v. State, 511 S.W.2d 510 (Tex.Cr.App. 1974) the test to be applied in determining whether counsel has provided constitutionally satisfactory service is the reasonably effective assistance standard set out in MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), cert. denied 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). In that case the Fifth Circuit pointed out

> "we interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance."

While we well recognize that a conflict of interest may deprive an accused of the effective assistance of counsel, compare Glasser v. U.S., 315 U.S. 60, 62 S.Ct. 457, 86 L.2d 680 (1941), we must look to the record of the individual case to determine whether or not there has been a denial of the effective assistance of counsel. In order for a conflict of interest to deny the effective assistance of counsel it must be clear that there is a conflict of interest and the attorney's interest was in such conflict as to deprive the accused of effective assistance. We fail to find such a conflict in this case.

As the appellant points out, it was of course to the interest of the attorney to attempt to show that he did not suborn the perjury of the witness involved in this case. It was also to the attorney's interest to show that his client did not suborn the perjury. It must be remembered that the testimony of the witness Aiken was to the effect that appellant's counsel, his wife, and perhaps the appellant was involved in

suborning the perjury. Therefore there was a joint interest on the part of appellant's counsel to show that not only did he not suborn the perjury, but also that his client did not suborn the perjury. Appellant testified as a witness and denied his participation and knowledge as to any perjured testimony, so his interest was effectively presented by his attorney. The record simply does not reflect that appellant's counsel was not effective after the witness Aiken indicated that he did suborn perjury.

Appellant's ground of error is overruled and the judgment of the trial court is affirmed.

PER CURIAM

(Delivered: November 15, 1978)

BY: Panel No. 3, 1st Qtr., 1978 composed of

Truman Roberts, Judge

W. T. Phillips, Judge

Jim Vollers, Judge

RECEIVED
NOV 4 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 79-6806

ORIGINAL COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

D. STEPHEN MENZIES,
Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The
Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III.
Executive Assistant
Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

DOUGLAS M. BECKER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

1. Whether the 'ifth Circuit Court of Appeals properly exercised its discretion in denying Petitioner's application for a certificate of probable cause to review his question regarding a conflict of interest by his criminal trial attorney.

TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES.	iii
OPINIONS BELOW.	1
JURISDICTION.	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	4
REASONS FOR DENYING THE WRIT.	5
I. THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION	5
II. THE FIFTH CIRCUIT COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION IN DENYING PETITIONER'S APPLICATION FOR A CERTIFICATE OF PROBABLE CAUSE	8
CONCLUSION.	10

TABLE OF AUTHORITIES

Cases	Page
Blankenship v. Estelle, 545 F.2d 510 (5th Cir. 1977).	7
Buffalino v. Reno, 613 F.2d 568 (5th Cir. 1980).	7
Cardinale v. Louisiana, 394 U.S. 437 (1969)	5
Coppedge v. United States, 369 U.S. 438 (1968). . .	6
Cuyler v. Sullivan, __ U.S. __, 100 S.Ct. 1708 (1980).	9
Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980).	7
Holloway v. Arkansas, 435 U.S. 475 (1978)	9
House v. Mayo, 324 U.S. 42 (1945)	2,6
In the Matter of Shuttlesworth, 369 U.S. 35 (1962)	9
In the Matter of the Application of Burwell, 350 U.S. 521 (1956)	6
Mayberry v. Davis, 608 F.2d 1070 (5th Cir. 1979).	7
McKinney v. Wainwright, 488 F.2d 28 (5th Cir. 1974), cert. denied, 416 U.S. 973 (1974).	7
Picard v. Connor, 404 U.S. 270 (1971)	8
Ramsey v. United Mine Workers, 401 U.S. 302 (1971)	7
Slayton v. Smith, 404 U.S. 270 (1971)	9
Stuckey v. Stynchcombe, 614 F.2d 75 (5th Cir. 1980).	7
Swenson v. Stidham, 409 U.S. 224 (1972)	7
Tacon v. Arizona, 410 U.S. 351 (1973)	7

Constitutions and Statutes	
U.S. Const. amend. IV	3
U.S. Const. amend. XIV.	3

28 U.S.C. §347(a) 2

28 U.S.C. §1254(1). 2

28 U.S.C. §1257(1). 2

28 U.S.C. §1651(a). 2,3,4

Sup. Ct. R. 26, 28 U.S.C. (1980). 4,5,8

Fed. R. App. P. 22(b) 6

NO. 79-6806

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

D. STEPHEN MENZIES,
Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The
Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Attorney General of Texas, on behalf of W. J. Estelle, Jr., respectfully requests that the Court deny the petition for writ of certiorari.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit denied Petitioner's pro se application for certificate of probable cause on February 28, 1980. On April 16, 1980, the Fifth Circuit denied Petitioner's second application for certificate of probable cause. Petitioner requested that a panel review his request. On May 29, 1980, the panel, consisting of Judges Ainsworth, Fay, and Randall, denied

Petitioner's application for certificate of probable cause. The Fifth Circuit's actions followed the entry of a judgment denying Petitioner's request for habeas corpus relief filed in the United States District Court for the Southern District of Texas, Houston Division, on December 29, 1979. The district court adopted the Memorandum and Recommendation of the United States Magistrate which is reproduced as Appendix A to the petition.

Petitioner also appealed his conviction to the Texas Court of Criminal Appeals on the same grounds he raised in federal district court. That court affirmed Petitioner's conviction in an unpublished per curiam opinion delivered November 15, 1978 (attached to Petitioner's petition at A-14).

JURISDICTION

Petitioner erroneously asserts that this Court has jurisdiction under 28 U.S.C. §1257(1). That statute governs review of state court decisions; here Petitioner seeks review of federal court decisions, which is governed by 28 U.S.C. §1254(1). But this Court may not grant the writ pursuant to §1254(1). It may only review the case, if at all, under the authority of 28 U.S.C. §1651(a). House v. Mayo, 324 U.S. 42 (1945), is absolutely clear upon this point, which significantly bears upon the appropriate standard governing this Court's decision whether to review the case. The relevant federal jurisdictional statute, now 28 U.S.C. §1254(1), formerly 28 U.S.C. §347(a), provides for review of cases "in" the Court of Appeals. As squarely held in House, 324 U.S. at 44, a case is not "in" the Court of Appeals unless a certificate of probable cause is granted.

For these reasons, the Court has jurisdiction over Petitioner's claim only under 28 U.S.C. §1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies upon the Sixth and Fourteenth Amendments to the United States Constitution in presenting his claim.

STATEMENT OF THE CASE

On August 26, 1974, Petitioner was indicted for the felony offense of rape by force and threats. On April 22, 1975, the case proceeded to trial in the 177th District Court of Harris County, Texas. Petitioner was represented by retained counsel, Mr. James Moore. A jury returned a verdict of guilty and assessed punishment at confinement for thirty years in the Texas Department of Corrections.

During the trial on the merits, Petitioner called a former employee, Ms. Sylvia Aiken, who testified that she had seen Petitioner at Denny's restaurant drinking coffee at 3:30 a.m. on the morning Petitioner allegedly raped Deborah Ann Stone, the prosecutrix. (State ROA 563). Ms. Aiken's testimony corroborated Petitioner's theory of the case and contradicted the testimony of the prosecutrix, who had tesified that she had been abducted at approximately 3:30 a.m. and had not been released until shortly before 7:00 a.m. (State ROA 285). Ms. Aiken also testified that she was quite afraid (State ROA 559), and that she had discussed her testimony with Petitioner's attorney and with the prosecutor. (State ROA 560).

On cross-examination, however, Ms. Aiken recanted her testimony and testified that she had been told what to say. (State ROA 574-75). When asked who had told her to come in and testify falsely, Ms. Aiken implicated Petitioner's wife, Petitioner's attorney, and perhaps Petitioner himself. (State ROA 575-78).

Petitioner's counsel then unsuccessfully attempted to rehabilitate his witness on redirect examination. (State ROA 579, et seq.). He then called several witnesses to negate the inference that he had suborned perjury, including Petitioner's wife, Sally Menzies; two attorneys who worked with Mr. Moore, Mr. Michael Eheman and Mr. John Hellums; and Mr. Moore's secretary, Ms. Wanda Taylor. These witnesses testified that Ms. Aiken had neither told them nor had they heard her tell anyone that the prior statement about seeing Petitioner at Denny's was not the truth. Petitioner also testified that Ms. Aiken had approached him and told him that she had seen him at Denny's. (State ROA 641). Petitioner now directs his complaints to this testimony.

SUMMARY OF ARGUMENT

Petitioner has failed to meet the requirements of Sup. Ct. R. 26, 28 U.S.C. (1980), governing issuance of extraordinary writs under 28 U.S.C. §1651(a), the only jurisdictional statute applicable to his case. He has not shown that granting his writ would aid the appellate court's jurisdiction, or that there are exceptional circumstances warranting the Court's review, or that adequate relief is unavailable in another forum. The Court should therefore deny Petitioner's application for writ of certiorari.

Alternatively, the Court of Appeals properly exercised its discretionary power and properly declined to grant Petitioner's application for a certificate of probable cause. The Court of Appeals properly viewed his complaint as being entirely without merit, as had the district court, because it did not reasonably appear that the sequence of events at his trial, although admittedly unusual, could possibly have diminished his counsel's loyalty to Petitioner.

On the contrary, the recanting alibi witness strengthened the mutuality of interest between Petitioner and his counsel.

No claim other than the alleged conflict of interest has been properly raised and presented throughout the state and federal proceedings. Thus, even if the Fifth Circuit abused its discretion, in denying Petitioner a certificate of probable cause, relief should be directed to the district court and Petitioner should be required to exhaust state remedies on the newly raised claim he now seeks to present.

REASONS FOR DENYING THE WRIT

I. THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Sup. Ct. R. 26, 28 U.S.C. (1980), provides:

> The issuance by this Court of any extraordinary writ authorized by 28 U.S.C. §1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court.

Petitioner has failed to show reasons sufficient to meet the above standard, and none exist.

First, no exceptional circumstances warrant the Court's exercise of its discretion. Petitioner has not shown or even suggested that the jury argument by the prosecutor was the product of a wide-spread prosecutorial policy. In fact, the prosecutor's jury argument was the unique result of a particular trial based on the particular testimony from that trial. No exceptional circumstances exist.

Second, Petitioner has not shown that granting his writ would aid the Court's appellate jurisdiction. The Court has established that it has the power to review the denial of

certificates of probable cause. House v. Mayo, 324 U.S. 42 (1945). In addition, this Court has left the procedures governing the determination whether to grant an application for certificate of probable cause to the Courts of Appeals. In the Matter of the Application of Burwell, 350 U.S. 521 (1956). This Court has not firmly set the standard that should be used by the Courts of Appeals in determining whether to grant a certificate of probable cause. But accepting for purposes of argument Petitioner's assertion that "the standard contemplated by [Fed.R.App.P. 22(b)], and the standard recognized in practice by the Courts of Appeals, ... is whether the applicant 'seeks appellate review of any issue not frivolous'" (Petitioner's Brief at 14, quoting Coppedge v. United States, 369 U.S. 438, 445 (1968), Petitioner raises no issue requiring this Court's attention. Petitioner, that is, concedes the existence of a Fifth Circuit standard very favorable to him and to others similarly situated. He complains that an admittedly proper standard was misapplied in his particular case. obviously this complaint suggests no matter that the Court should review.

Third, Petitioner has not shown that adequate relief cannot be had in any other court. In the district court Petitioner claimed solely that Ms. Aiken's testimony created a conflict of interest which deprived him of effective assistance of counsel. He raised only the effective assistance of counsel point in his first motion for leave to appeal. Petitioner first raised his due process allegations in his Second Application For Certificate of Probable Cause in the Fifth Circuit. In that application the Petitioner admitted:

> Thus far, unfortunately, the questions have been framed within the rubic of a "conflict of interest" between Petitioner and his trial counsel, leading to the superficially appealing conclusion that, because their interests in attacking the witness's testimony were not antagonistic, there was no constitutional violation. This conceptualization of the problem, and the solution it suggests, has obscured if not totally obliterated entirely a much more basic point: Petitioner's trial was fundamentally unfair. . .

(Petitioner's Second Application For Certificate of Probable Cause And Leave To Appeal In Forma Pauperis at 14).

The Fifth Circuit has consistently refused to review habeas corpus claims not properly raised and decided in both the state and federal courts. E.g., Stuckey v. Stynchcombe, 614 F.2d 75 (5th Cir. 1980); Buffalino v. Reno, 613 F.2d 568 (5th Cir. 1980); Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980); Mayberry v. Davis, 608 F.2d 1070 (5th Cir. 1979); Blankenship v. Estelle, 545 F.2d 510 (5th Cir. 1977); cert. denied, __ U.S. __, 100 S.Ct. 115 (1979); McKinney v. Wainwright, 488 F.2d 28 (5th Cir.), cert. denied, 416 U.S. 973 (1974). Similarly, this Court normally refuses to consider arguments that have not been raised in the lower courts. Tacon v. Arizona, 410 U.S. 351 (1973); Ramsey v. United Mine Workers, 401 U.S. 302 (1971); Cardinale v. Louisiana, 394 U.S. 437 (1969). It is not the Court's function to deal with an issue in the first instance. Swenson v. Stidham, 409 U.S. 224, 231 (1972). Petitioner may apply for relief in the courts below and raise the due process issue he seeks to raise in this court. Petitioner has not shown that relief is unavailable in the lower federal courts.

Fourth, Petitioner has not shown that relief is unavailable in the Texas courts. On his appeal to the Texas Court of Criminal Appeals, Petitioner raised solely the ineffective assistance of counsel issue in that court. He has not filed

any state writs for habeas corpus relief. In Picard v. Connor, 404 U.S. 270, 275-76 (1971) this Court stated:

> We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent 'unnecessary conflict between courts equally bound to guard and protect the rights secured by the Constitution,' . . . [citations omitted], it is not sufficient merely that the federal habeas corpus applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts.

Petitioner should be required, as a matter of federal-state comity, to present the same factual claims and legal theories in both the state and federal courts to properly exhaust his state remedies under 28 U.S.C. §2254. Since Petitioner has never presented his due process theory in the state courts, habeas corpus relief remains available. Thus, Petitioner has not shown that adequate relief cannot be had in any other forum as required under Sup. Ct. R. 26, 28 U.S.C. (1980).

II. THE FIFTH CIRCUIT COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION IN DENYING PETITIONER'S APPLICATION FOR A CERTIFICATE OF PROBABLE CAUSE.

In addition to the fact that Petitioner fails to meet the requisites of Rule 26 of this Court, the Fifth Circuit properly exercised its discretion in denying Petitioner's application for certificate of probable cause. The Texas Court of Criminal Appeals and the federal magistrate correctly concluded that Petitioner's interest was in discrediting Ms. Aiken's story. Thus, the interests of Petitioner and counsel were convergent, rather than in conflict, and counsel's efforts to discredit Ms. Aiken therefore constituted effective rather then ineffective representation. It cannot reasonably be argued that any attorney would have undertaken any action even slightly different from that undertaken in fact by Petitioner's trial counsel: an all-out attack on the credibility of Ms. Aiken.

This Court has recently held that in order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. Cuyler v. Sullivan, __ U.S. __, 100 S.Ct. 1708, 1718 (1980). See also, Holloway v. Arkansas, 435 U.S. 475 (1978). Manifestly, Petitioner has failed to meet this burden. For that reason, any appeal would be frivolous.

If this Court nevertheless believes that the issue Petitioner raises is not frivolous and that the Fifth Circuit should have considered Petitioner's newly raised due process theory, this Court should not reach the merits of Petitioner's allegations. The record is insufficient to determine the probable effects of Ms. Aiken's recantation and subsequent rehabilitation testimony upon the jurors. A proper record, perhaps including expert testimony in this regard and conceivably the testimony of one or more jurors, should be made in the courts below and not in this Court.

In addition, if this Court decides to grant Petitioner's writ, it should treat the writ as an appeal from the district court's denial of Petitioner's application for certificate of probable cause, and remand the case to the district court with instructions to dismiss the matter while Petitioner exhausts state remedies. See, Slayton v. Smith, 404 U.S. 53 (1971); In the Matter of Shuttlesworth, 369 U.S. 35 (1962).

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, for the above reasons stated, Respondent respectfully requests that the petition for writ of certiorari be denied, or that relief be limited to remanding the case to the district court with directions to dismiss the matter while Petitioner exhausts state remedies.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

Douglas M. Becker

DOUGLAS M. BECKER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT